Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

EDDIE MAYS, et al.,
Petitioners,

v.

CITY OF EAST ST. LOUIS, ILLINOIS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Appeals Court erred in holding that substantive due process is not implicated in the context of a high speed police pursuit.

2. Whether the Petitioners' First Amended Complaint stated a claim for relief under 42 U.S.C. § 1983 for violations of their substantive due process rights as secured by the Fourteenth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioners Eddie Mays, Delores Mays, Crystal Mays, a minor acting by and through her next-friend and natural mother Eddie Mays, Tamara Moran, a minor acting by and through her next-friend and natural mother Eddie Mays, Antoinette Moran, a minor acting by and through her next-friend and natural mother Eddie Mays, Janieka Hill, a minor acting by and through her next-friend and natural mother Cynthia Gaston, Chetoya Hill, a minor acting by and through her next-friend and natural mother Cynthia Gaston, Eddie Mays, in her capacity as the independent administrator of the estate of Victoria Moran on behalf of the estate, and Lamont Moran, were the plaintiffs in the district court proceedings and the appellants before the Court of Appeals for the Seventh Circuit. Petitioners are residents of the state of Illinois.

Respondent, City of East St. Louis, is a municipal corporation in the State of Illinois. It was a defendant in the district court and an appellee before the Court of Appeals for the Seventh Circuit.

Respondent, Leland Cherry, was a police officer of the City of East St. Louis. He was a defendant in the district court proceedings and an appellee before the Court of Appeals for the Seventh Circuit.

Respondent, Victor Burries, is an individual. He was a defendant and third-party defendant in the district court proceedings and an appellee before the Court of Appeals for the Seventh Circuit.

Viola Freeman and Martha Burries, were defendants in the district court proceedings but were not appellees before the Court of Appeals for the Seventh Circuit and are not parties to action.

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PETITION FOR CERTIORARI

Petitioners Eddie Mays, Delores Mays, Crystal Mays, a minor acting by and through her next-friend and natural mother Eddie Mays, Tamara Moran, a minor acting by and through her next-friend and natural mother Eddie Mays, Antoinette Moran, a minor acting by and through her next-friend and natural mother Eddie Mays, Janieka Hill, a minor acting by and through her next-friend and natural mother Cynthia Gaston, Chetoya Hill, a minor acting by and through her next-friend and natural mother Cynthia Gaston, Eddie Mays, in her capacity as the independent administrator of the estate of Victoria Moran on behalf of the estate, and Lamont Moran, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

On August 29, 1997, the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit") issued its opinion, affirming the judgment of the United States District Court for the Southern District of Illinois. (App. B, A3). By order filed September 23, 1997, the Seventh Circuit denied the petition for rehearing and suggestion for rehearing en banc. (App. C, A16) The Seventh Circuit opinion is reported in *Mays v. City of East St. Louis, Ill.*, 123 F.3d 999 (7th Cir. 1997). (App. B, A3)

STATEMENT OF JURISDICTION

Petitioners seek review of the opinion of the United States Court of Appeals for the Seventh Circuit (App. B, A3) and its judgment of August 29, 1997. (App. A, A1) On September 23, 1997 the Seventh Circuit entered its order

denying the timely filed petition for rehearing and suggestion for rehearing en banc. (App. C, A16) On December 12, 1997, Justice Stevens extended the time within which to file a petition for a writ of certiorari, up to and including February 20, 1998. Petitioners invoke the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

United States Constitution, Amendment XIV, §1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statue of the District of Columbia.

STATEMENT OF THE CASE

A. Proceedings

This is a case, brought pursuant to 42 U.S.C. § 1983, involving a police officer's high speed pursuit of a vehicle that culminated in a catastrophic collision resulting in death and grievous bodily injury. Petitioners' Complaint in the United States District Court for the Southern District of Illinois asserted constitutional claims and supplemental state law tort claims against police officer Leland Cherry, and against the City of East St. Louis, Illinois for injuries sustained as a result of officer Cherry's pursuit of the vehicle in which they were passengers, on July 10, 1994. The district court had original jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(3) and (4).

Respondents Cherry and the City of East St. Louis moved to dismiss Petitioners' Complaint and filed a Third-Party Complaint against Victor Lee Burries, the driver of the vehicle. Petitioners filed a First Amended Complaint, reasserting the constitutional claims and supplemental state law claims against Cherry and the City of East St. Louis and asserting additional state law tort claims against Victor Lee Burries, and Viola Freeman and Martha Burries, who allegedly entrusted the vehicle to Victor Lee Burries. Cherry and the City of East St. Louis filed a motion to dismiss Petitioners' First Amended Complaint.

On August 29, 1997, the district court, relying on *Collins v. City of Harker* Heights, 503 U.S. 115 (1992) and *Fagan v. City of Vineland*, 22 F.3d 1296, 1312 (3rd Cir. 1994)(en banc), dismissed with prejudice the constitutional claims in Petitioners' First Amended Complaint pursuant to Fed.R.Civ.P. 12(b)(6) holding that officer Cherry's conduct

did not "shock the conscience."[1] The district court dismissed the pendent state law claims without prejudice for lack of subject matter jurisdiction and dismissed the Respondents' Third-Party Complaint. The district court entered Judgment on August 23, 1996. On August 29, 1997, the Court of Appeals for the Seventh Circuit affirmed the district court's judgment, with the majority holding that substantive due process was not implicated in the context of police high speed pursuits. On September 23, 1997, the Seventh Circuit denied Petitioners' timely petition for rehearing with suggestion for rehearing en banc. On December 12, 1997, Justice Stevens extended the time within which to file a petition for a writ of certiorari, up to and including February 20, 1998.

B. Statement of Facts

On July 10, 1994, at approximately 1:00 am, Eddie Mays and her four (4) children, Crystal Mays, Tamara Moran, Antoinette Moran, Victoria Moran and two (2) children in her care, Janieka Hill and Chetoya Hill, received

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[1] Petitioners' First Amended Complaint asserted constitutional claims against Officer Cherry for violation of substantive due process rights as secured by the Fourteenth Amendment and violations of the Fourth Amendment under the theory that officer Cherry used a cement barrier as a road block to intentionally terminate the movement of the Petitioners, thereby illegally seizing Petitioners. *Brower v. County of Inyo*, 489 U.S. 593 (1989). The Fourth Amendment claims were not asserted on appeal and are therefore not germane to the issues herein.

Petitioners asserted claims against the City of East St. Louis under *Monell v. Department of Social Services*, 436 U.S. 658 (1978) and its progeny. Supplemental state law tort claims were also asserted against Cherry, the City of East St. Louis, Victor Lee Burries, Viola Freeman and Martha Burries.

a ride from Victor Lee Burries on the promise to pay him several dollars for gas. Eddie Mays and the children had been at a family gathering after visiting her mother in the hospital. Eddie Mays and the six (6) children and Delores Mays entered Victor Lee Burries' four (4) door 1980 Buick Regal bearing Illinois license plate # MNB870, in front of Eddie Mays mother's home in East St. Louis, Illinois. Victor Lee Burries and Pearl Burries were also in the car. Victor Lee Burries drove the Buick and proceeded down Broadway Avenue in East St. Louis, Illinois, with the three (3) adults and the six (6) children in the vehicle.

At or around 2nd Street and Broadway Avenue, East St. Louis Police Officer Leland Cherry first observed the Buick. The Buick passed close by Cherry's vehicle, a marked East St. Louis police car, and Cherry was observed by the occupants of the Buick to look in their direction. Petitioners allege in their First Amended Complaint that Cherry saw or should have seen that the Buick contained numerous occupants, including six (6) small children.

Thereafter, Burries made a U-turn and the Buick proceeded east on Broadway. Officer Cherry pursued the Buick, purportedly for a minor traffic violation - the U-turn - committed in his presence. Cherry overtook the Buick from 4th Street and Broadway Ave., traveling east bound on Broadway. Cherry sped up behind the Buick, activating his spot light, red emergency lights and siren.

While following the Buick, Cherry was close enough to again observe that the Buick contained numerous innocent occupants, including six (6) small children. Petitioners allege that Officer Cherry saw or should have seen the Buick's Illinois license plate number MNB870, and he had the ability to discover via his police radio that the Buick was registered

to Viola Freeman and was not reported stolen or otherwise wanted for being engaged in illegal activity. Alternatively, petitioners allege that defendant Cherry got enough information from which to ascertain the owner of the Buick at a later date.

As Officer Cherry pursued, the Buick increased its speed. The Buick ran through numerous stop signs and red lights, swerved in and out of the traffic lanes, followed by Cherry's police vehicle. As the Buick increased its speed, Office Cherry increased the speed of his police vehicle accordingly.

During the high speed pursuit, which spanned nearly 20 blocks down Broadway Ave., a heavily populated thoroughfare, the vehicles reached speeds far in excess of the posted speed limit. At no time did Officer Cherry break off his pursuit of the Buick or otherwise slacken his speed behind the Buick; rather as the Buick went faster, so did Cherry. During the pursuit, the lights from Cherry's police car continuously shined on the Buick, thereby causing a possible obstruction to Burries' ability to see and operate the Buick.

Officer Cherry continued to follow the Buick, causing it to go over railroad tracks at or about 1800 Broadway Ave. and become airborne, thereafter the Buick collided head-on into an enormous cement barrier at 20th and Broadway. Petitioners allege that Officer Cherry knew that Broadway dead ended at 20th Street and knew of the existence of the cement barrier. The cement barrier functioned as a "deadman" roadblock, prohibiting any safe escape route for the Buick that was being pursued by Officer Cherry. Officer Cherry knew or should have known that his actions would result in the death or serious physical injury to the occupants of the Buick, including children, in that the Buick would not be able to

avoid striking the cement barrier.

As a result of the Buick's impact with the cement barrier, one of the children, Victoria Moran, was thrown from the Buick and was killed. The other occupants of the Buick suffered severe injuries.

At no time prior to the collision, did the driver Victor Burries, or any occupant of the Buick commit a felony in the presence of the Officer Cherry, nor were any occupants wanted on any criminal charges.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE OPINION OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE OTHER COURTS OF APPEALS REGARDING WHETHER SUBSTANTIVE DUE PROCESS IS IMPLICATED IN THE CONTEXT OF A HIGH SPEED POLICE PURSUIT WHICH RESULTS IN INJURY TO A CITIZEN.

This Court has granted certiorari in *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996) cert. granted, 117 S.Ct. 2406 (1997), a civil rights case, like this action, in which the primary claim is the deprivation of the substantive due process rights of a citizen killed in a high speed police chase. In *Lewis*, one of the questions presented in the Petitioner's Brief is

> Whether, in a police pursuit, case, the legal standard of conduct necessary to establish a violation of substantive due process under the

> Fourteenth Amendment is "shocks the conscience" as determined by this Court in *Collins v. City of Harker Heights, Texas*, 503 U.S. 115 (1992) and other Circuit Court cases or is "deliberate indifference" or "reckless disregard" as determined by the Ninth Circuit in this case.[2]

The Petitioners in *Lewis* sought certiorari review by this Court to resolve the conflict among the circuits as to what level of culpability is necessary to establish a substantive due process violation in the context of a high speed police chase. The circuit courts are split with regard to whether the offending conduct must "shock the conscience" to violate substantive due process, *Boveri v. Town of Saugus*, 113 F.3d 4 (1st Cir. 1997); *Evans v. Avery*, 100 F.3d 1033 (1st Cir. 1996) *cert. denied,* 117 S.Ct. 1693 (1997), *reh'g denied*, 138 L.Ed.2d 1032, 1997 U.S. Lexis 4222; *Fagan v. City of Vineland*, 22 F.3d 1296, 1312 (3rd Cir. 1994)(en banc); *Tempkin v. Frederick County Com'rs*, 945 F.2d 716 (4th Cir. 1991), *cert. denied,* 502 U.S. 1095 (1992); *Checki v. Webb*, 785 F.2d 534 (5th Cir. 1986); *Williams v. City and County of Denver*, 99 F.3d 1009 (10th Cir. 1996) *reh'g granted en banc* (March 3, 1997). or whether "deliberate indifference or "reckless disregard"is sufficient. *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987), *modified by Foy v. Berea*, 58 F.3d 227, 230 (6th Cir. 1995); *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996) cert. granted, 117 S.Ct. 2406 (1997). In all of the aforementioned cases, the courts held that substantive due process is implicated in a high speed pursuit,

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[2] *Petitioner' Brief* at i, *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996) cert. granted, 117 S.Ct. 2406 (1997).

differing only on the standard of proof required for liability.[3]

The Seventh Circuit in the instant action[4], broke from the body of law that developed with regard to this issue and held

> Caution in the creation of new rights leads us to conclude that the sort of claim plaintiffs make is not a proper invocation of substantive due process.(Although the parties were content to debate the use of "recklessness" versus "shocks the conscience," we are entitled to decide the antecedent question whether substantive due process supplies the rule of law. (Citations omitted)) (App. B, A7).

The Seventh Circuit further held that "[t]his nation's social and legal traditions do not give passengers a legal right — as opposed to a moral claim — to have police officers protect them by letting criminals escape." (App. B, A10). The Court explained its holding:

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[3] The Eighth Circuit in *Roach v. City of Fredericktown*, 882 F.2d 294 (8th Cir. 1989) and the Eleventh Circuit in *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986) and *Rooney v. Watson*, 101 F.3d 1378 (11th Cir. 1996) have evaluated high speed pursuit cases without clearly articulating what standard of proof is necessary to state a claim for violation of substantive due process.

[4] In the instant action, Circuit Justice Ripple filed a concurring opinion stating "[i]n my view, the district court, relying on the well-reasoned opinions of our colleagues in other circuits, properly applied the "shocks the conscience" test that has developed in the Country's due process jurisprudence." (App. A14).

> Death and disability haunt law enforcement. Lax law enforcement emboldens criminals and leads to more crime. Zealous pursuit of suspects jeopardizes bystanders and persons accompanying the offender. Easy solutions rarely work, and *ex post* assessments — based on sympathy for those the criminal has injured, while disregarding the risks to society at large from new restrictions on how the police work — are unlikely to promote aggregate social welfare. Interstices of the Constitution do not contain a solution to the fix the police find themselves in when deciding how vigorously to pursue a criminal. The Constitution's requirements for arrests appear in the fourth amendment. Officer Cherry did not violate the rules that amendment contains. Extra rights come from the political process or the common law rather than constitutional command. Contemporary society may make for itself the hard choices on which public safety depends. (App. B, A14).

The Seventh Circuit's decision is contrary to the decisions of all of the other circuit courts that have grappled with claims arising from high speed police pursuits. As such, Petitioners were denied review of their claims under any substantive due process standard, whether it be "shocks the conscience," "deliberate indifference" or "reckless disregard."As it is anticipated that this Court will determine in *Lewis* the proper standard of conduct to apply to a case such as the instant action, Petitioners request that this Court grant certiorari so that this action is given proper consideration and that the facts alleged by Petitioners are judged in accordance with the decision which will come forth

in *Lewis*.

Furthermore, as the Seventh Circuit opinion in this case decided that no cause of action exists under the rubric of substantive due process when a citizen is injured in a high speed police chase, the granting of certiorari would give the Court a fuller opportunity to evaluate whether the Fourteenth Amendment can ever be implicated in a police pursuit case. In *Lewis*, both the Petitioner's Brief and the Respondent's Brief focus their arguments on whether the legal standard for a substantive due process should be "shocks the conscience" versus "deliberate indifference" or "reckless disregard."[5] While several of the amicus in *Lewis* urge the Court to address the threshold issue of whether the Fourteenth Amendment applies at all[6], the posture of this case would necessarily require that issue to be addressed head on.

Petitioners respectfully request that the Court grant certiorari and hear this case in conjunction with the *Lewis* case or grant certiorari so that the decision in *Lewis* may be applied to the facts herein.

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[5] *Petitioner' Brief* at 12-27, *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996) cert. granted, 117 S.Ct. 2406 (1997), *Respondent's Brief* at 9-26, *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996) cert. granted, 117 S.Ct. 2406 (1997).

[6] *Amicus Brief of the County of Riverside, et al.* at 5, *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996) cert. granted, 117 S.Ct. 2406 (1997); *Amicus Brief of the National Association of Counties, et al.* at 7, *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996) cert. granted, 117 S.Ct. 2406 (1997).

II. PETITIONERS' FIRST AMENDED COMPLAINT, VIEWED IN THE LIGHT MOST FAVORABLE TO THE PETITIONERS AND DRAWING ALL REASONABLE INFERENCES FROM THE FACTS PLEADED THEREIN, STATED A CLAIM FOR VIOLATION OF THEIR SUBSTANTIVE DUE PROCESS RIGHTS AS GUARANTEED BY THE FOURTEENTH AMENDMENT.

Petitioners advocate the position which is advanced by the Respondent in *Lewis v. Sacramento County*, to-wit: the proper standard in reviewing whether substantive due process is violated in the context of a high speed police pursuit is whether the pursuing officer's conduct evidences "deliberate indifference"or "reckless disregard."[7] In this action, neither the district court, nor the circuit court found, and the respondents did not argue that Officer Cherry's conduct as alleged in the First Amended Complaint was not tantamount to recklessness. Petitioners assert that his conduct was at a minimum reckless.

Moreover, the facts that form the basis for Petitioners' claims are so unique and horrific that the conduct goes beyond mere recklessness. Officer Cherry pursued a car occupied by *ten (10) people*, including *six (6) innocent children*, because of an improper U-turn, and thereafter chased the vehicle at high rates of speed for twenty (20) blocks down a street that the officer knew dead ended into a cement barrier, knowing that his actions would certainly cause the vehicle to crash into the cement barrier. Even if viewed through a "shocks the

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[7] *Respondent's Brief* at 9-26, *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996) cert. granted, 117 S.Ct. 2406 (1997).

conscience" lens, these facts state a claim for deprivation of Petitioners' Fourteenth Amendment rights.

The Respondents have maintained that the facts as pleaded do not amount to the type of egregious or arbitrary police conduct that would shock the judicial conscience. The district court analogized this case to facts presented in *Fagan v. City of Vineland*, 22 F.3d 1296, 1312 (3rd Cir. 1994)(en banc).[8] The district court then decided that [w]hile Cherry was or should have been aware that the vehicle would crash into the cement barrier, his conduct cannot, even in the light most favorable to the plaintiff, be considered malicious." (App. A26). In so holding, the district court discounted the facts that differentiate this case from the other reported high speed police cases; that the chase involved a car occupied by *six (6) children* and four (4) adults down a street that dead-ended into a concrete barrier, with no escape route.

Petitioners respectfully request that as the majority of the Appellate Court did not evaluate the facts of this case under any substantive due process standard, whether it be "deliberate indifference," "reckless disregard" or "shocks the conscience," the petition for certiorari should be granted so that proper standard is applied and a just determination of Petitioners' constitutional claims is made.

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[8] In *Fagan*, the Third Circuit determined that alleged deviant conduct in the high speed pursuit did not "shock the conscience."

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

/s/_____
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APPENDIX A

UNITES STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: August 29, 1997

BEFORE:

Honorable FRANK H. EASTERBROOK, Circuit Judge

Honorable KENNETH F. RIPPLE, Circuit Judge

Honorable DANIEL A. MANION, Circuit Judge

No. 96-3366

EDDIE MAYS, in her capacity as the independent administrator of the Estate of Victoria Moran on behalf of the estate, DELORIS MAYS, CRYSTAL MAYS, a minor, acting by and through her next friend and natural mother Eddie Mays, et al.,
Plaintiffs - Appellants

v.

CITY OF EAST ST. LOUIS, ILLINOIS, a municipal corporation and LELAND CHERRY,
Defendants - Appellees

Eddie Mays, et al. v. City of East St. Louis and Leland Cherry
96-3366

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division No. 95 C 530, William D. Stiehl, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-3366

EDDIE MAYS, *et al.*,

Plaintiffs-Appellants,

v.

CITY OF EAST ST. LOUIS, ILLINOIS,
LELAND CHERRY, and VICTOR LEE BURRIES,

Defendants -Appellees.

Appeal from the United States District Court for the
Southern District of Illinois.
No. 95-CV-530-WDS--William D. Stiehl, *Judge.*

ARGUED FEBRUARY 26, 1997--DECIDED AUGUST 29, 1997

Before EASTERBROOK, RIPPLE, and MANION, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Victor Lee Burries made an illegal U-turn one night in East St. Louis. Officer Leland Cherry activated his lights and pulled behind the car

to make a traffic stop. Burries did not halt. Cherry turned on his siren and spotlight. Burries then took off at high speed, ignored red lights, and swerved across lanes to avoid traffic, with Cherry in pursuit. At a railroad crossing Burries' auto became airborne; on the way down it smashed into a cement barrier. Nine people (six of them children) were passengers in Burries' car. One died; others were severely injured. Many of the injured (though not Burries' mother, who was among the passengers), plus the estate of the passenger who died, sued Cherry and the City under 42 U.S.C. §1983. These original defendants impleaded Burries, who has defaulted.

The traffic violation gave Cherry probable cause to arrest Burries. *Whren v. United States,* 116 S. Ct. 1769 (1996). An arrest following a traffic stop includes not only the driver but also the passengers; their freedom, too, will be restricted, if only until the officers assure themselves that the scene is safe. *Maryland v. Wilson,* 117 S. Ct. 882 (1997). But Burries fled, and the arrest was not completed. *California v. Hodari D.,* 499 U.S. 621 (1991). Plaintiffs do not argue that Cherry lured Burries into a barrier or cul de sac in order to cause a collision, so there was no seizure under the approach of *Brower v. Inyo County*, 489 U.S. 593 (1989). See *Kernats v. O'Sullivan,* 35 F.3d 1171 (7th Cir. 1994); *Donovan v. Milwaukee,* 17 F.3d 944 (7th Cir. 1994); *Campbell v. White,* 916 F.2d 421 (7th Cir. 1990). Similarly plaintiffs do not contend that in giving pursuit Cherry applied deadly force, which may or may not have been justified under the approach of *Tennessee v. Garner,* 471 U.S. 1 (1985). (Burries' acts endangered his passengers and other cars on the road, which may have justified force to bring his car to a

stop, but we need not confront the question. Cf. *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988) (en banc).) An automobile on one's tail is some distance from a bullet in the back. The pursued driver has it within his power to avoid injury--indeed, to avoid risk of injury--by slowing to a halt after the officer decides to pursue. *Garner* distinguished a chase from the use of a weapon. So Cherry's actions did not violate the fourth amendment.

Plaintiffs' claim rests on the fifth rather than the fourth amendment. They say that Cherry deprived them of liberty (and one of them of life) without due process of law, because a U-turn is too trivial an offense to justify high-speed pursuit. As plaintiffs see it, the Constitution required Cherry to jot down the license plate number and let the driver escape. They do not contend that Cherry had to offer a pre-chase hearing, a ludicrous idea. Cherry was trying to *give* notice--a traffic ticket is legal "process" that would offer the opportunity for a judicial hearing. Notice in hand is highly desirable; otherwise all the police have is a license plate number, and someone other than the owner may have been driving. The driver, not the car, is the offender, and there is always a risk that the driver is committing other offenses (such as driving while intoxicated or without a license) that endanger both passengers and other motorists; why else take flight? Perhaps Burries wanted to conceal something less serious; the facts suggest that he may have been running an illegal jitney service. Yet a desire to avoid being caught impersonating a taxi driver is a poor explanation for flight to avoid arrest, a crime with a much greater punishment. Darker reasons thus may have been present, but we need not pursue the issue. It is enough to observe that any effort to

give notice may be conducted carelessly, but whatever process may be appropriate to deal with tortious conduct by the police is afforded by the opportunity to bring suit in state court. See *Zinermon v. Burch,* 494 U.S. 113 (1990); *Hudson v. Palmer,* 468 U.S. 517 (1984); *Parratt v. Taylor,* 451 U.S. 527 (1981); *Easter House v. Felder,* 910 F.2d 1387 (7th Cir. 1990) (en banc).

According to plaintiffs, the due process clause has a substantive component, which in their view requires public officials to refrain from any reckless act that endangers others. Two courts of appeals have held that recklessness (or perhaps "deliberate indifference") in initiating or conducting a high-speed chase indeed violates the due process clause. *Jones v. Sherrill,* 827 F.2d 1102 (6th Cir. 1987), modified by *Foy v. Berea,* 58 F.3d 227, 230 (6th Cir. 1995); *Lewis v. Sacramento County,* 98 F.3d 434 (9th Cir. 1996), cert. granted, 117 S. Ct. 2406 (1997). Others have held that only conduct that "shocks the conscience" a standard that these courts believe to place a higher burden on plaintiffs-offends standards of substantive due process. *Evans v. Avery,* 100 F.3d 1033 (1st Cir. 1996); *Fagan v. Vineland,* 22 F.3d 1296 (3d Cir. 1994) (en banc); *Ternkin v. Frederick County Commissioners,* 945 F.2d 716 (4th Cir. 1991); *Checki v. Webb,* 785 F.2d 534 (5th Cir. 1986); *Williams v. Denver,* 99 F.3d 1009 (10th Cir. 1996). At least two courts have held that gross negligence in the conduct of a chase does not violate the due process clause, without implying that proof satisfying a higher standard would establish liability. *Roach v. Fredericktown,* 882 F.2d 294 (8th Cir. 1989); *Rooney v. Watson,* 101 F.3d 1378 (11th Cir. 1996). The district court in this case adopted a shocks-the-conscience approach. After

concluding that the events did not make his conscience tingle, the judge entered judgment for both Cherry and the City.

Conflict among the circuits about the right way to put the rule of decision is attributable in no small measure to the fact that "substantive due process" is an oxymoron. It does not appear in the text of the Constitution but rather is inferred from the assumption underlying this Constitution of limited government (one made explicit in the ninth amendment) that some rights are beyond the power of popular majorities to affect, process or no. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267 (1997). Inferring rights from constitutional structure has the sanction of history. Judicial review of legislation's constitutionality is itself an inference from structure (there is no "judicial review clause" in Article III). Likewise with the web of intergovernmental immunities. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); *Printz v. United States*, 117 S. Ct. 2365 (1997). Yet a court asked to rely on structure rather than text must be diffident, for the legitimacy of judicial review is at its nadir--a point the Supreme Court has made repeatedly about substantive due process. E.g, *Albright v. Oliver*, 510 U.S. 266, 271-72 (1994) (plurality opinion); *Reno v. Flores*, 507 U.S. 292, 301-02 (1993); *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992); *Graham v. Connor*, 490 U.S. 386 (1989). Caution in the creation of new rights leads us to conclude that the sort of claim plaintiffs make is not a proper invocation of substantive due process. (Although the parties were content to debate the use of "recklessness" versus "shocks the conscience," we are entitled to decide the antecedent question whether substantive due process supplies the rule of law. See *Kamen v. Kemper Financial Services*, 500 U.S. 90, 99 (1991); *United States*

National Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439, 445-48 (1993).)

Life is the most fundamental of liberties. Nonetheless, as *Glucksberg* observes, even decisions about life or death are subject to regulation. The Court asks not only whether a right is fundamental, but also whether the nation's legal tradition and practices recognize a specific limitation on governmental action with respect to a specific right. 117 S. Ct. at 2268. Our nation's legal traditions recognize many vital limitations on the way police apprehend suspects--but these rights are protected by the fourth amendment. Police may make arrests that are authorized by statute and "reasonable" within the meaning of the fourth amendment. A traffic stop on probable cause is reasonable, see *Whren,* and flight to avoid arrest is a traditional reason to give chase. Flight is a new crime, more serious than the original traffic infraction. As we have already shown, Officer Cherry's conduct did not violate the fourth amendment. Cf. *Ricci v. Arlington Heights*, 116 F.3d 288 (7th Cir. 1997) (arrest on probable cause is constitutionally permissible even when the maximum penalty is a fine). *Graham* holds that if the police comply with the fourth amendment, it is inappropriate to conduct a further inquiry under the rubric of "substantive due process." A conclusion that a seizure (or attempted seizure) satisfies the fourth amendment does not foreclose a claim based on another provision of the Constitution. That is the point of *Soldal v. Cook County,* 506 U.S. 56 (1992), which held that a lessee may be entitled to a pre-seizure hearing, when eviction and seizure of the person are combined. But once the substantive criteria of the fourth amendment have been applied, there is neither need nor justification for another substantive inquiry--

one based not on constitutional text but on an inference from structure. The textual Constitution prevails.

In case after case during recent years, the Court has looked exclusively to the fourth amendment for substantive limits to searches and seizures. Take for example *Winston v. Lee,* 470 U.S. 753 (1985), where the police wanted to remove a bullet lodged deep in a suspect's body. Instead of asking, as it might have done in former years, see *Rochin v. California,* 342 U.S. 165, 172 (1952), whether physical invasion would shock the conscience, the Court asked whether the search of the suspect's body would be "reasonable" under the fourth amendment. In *Garner* the Court used fourth amendment principles to develop a framework for the use of deadly force in making arrests; substantive due process went unmentioned. *Graham* followed up by holding that the fourth amendment is the exclusive source of rules for determining the permissible amount of force in making an arrest. See also *Lester v. Chicago,* 830 F.2d 706 (7th Cir. 1987). In *Albright* the Court concluded that the fourth amendment supplies the structure for addressing claims of malicious prosecution: wrongful prosecution isn't a constitutional tort, the Court held, unless it leads to wrongful arrest or custody, using fourth amendment principles to determine when custody is wrongful. The Court said in *Baker v. McCollan,* 443 U.S. 137 (1979), that officials' compliance with the fourth amendment forecloses actions for the deprivation of liberty at the time of an arrest--and it said this despite the preference of a concurring Justice for a "shocks the conscience" approach derived from *Rochin.* 443 U.S. at 147 (Blackmun, J., concurring). Recently the Court summed up its view this way: *"Graham* simply requires that if a constitutional claim

is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier,* 117 S. Ct. 1219, 1228 n.7 (1997).

Although *Graham* involved a claim of excessive force in making an arrest, its logic is equally applicable to claims of excessive zeal in attempting to make an arrest. One cannot distinguish *Graham* by saying that the plaintiff was the offender, and here the plaintiffs are passengers. Plaintiffs do not argue that Officer Cherry was after the passengers rather than the driver, or chased the car because of the passengers; the probable cause supporting the pursuit concerned the driver, and was adequate to justify a stop of the car. A lawful stop of the car is a lawful seizure of all passengers. Nothing but confusion could come from evaluating claims by the driver under the fourth amendment and claims by the passengers under substantive due process.

This nation's social and legal traditions do not give passengers a legal right--as opposed to a moral claim--to have police officers protect them by letting criminals escape. Suppose a bank robber takes hostages and demands free passage as the price of the hostages' release. Suppose further that the police do not comply, and that the robber then shoots a hostage. Do the decedent's relatives have a claim against the police? Does substantive due process require the police to comply with the robber's demand, or may they adopt the policy of never negotiating in order to reduce the incentive for thugs to take hostages in the future? Which policy is best for the people as a whole is a complex question, answered

different ways at different times in this nation (and in dramatically different ways by different nations today)--but it is a question about moral and efficient law enforcement for the people to debate and resolve. It is not a question whose only answer must be given by the judicial branch on the basis of "substantive due process." Common law doctrines reinforce this understanding of our legal culture. A person whose negligence just sets the stage for a criminal act generally is not liable for ensuing injury. For example, a person who negligently leaves a car unattended, with the keys in the ignition, is generally not liable to a person injured by a thief driving the car. See *Prosser & Keeton on The Law of Torts* 201, 313-14 (W. Page Keeton 5th ed. 1984). Similarly, it is well understood that people need not take precautions against intentional torts--and "intentional tort" is the mildest description of Burries' behavior.

Political society must consider not only the risks to passengers, pedestrians, and other drivers that high-speed chases engender, but also the fact that if police are forbidden to pursue, then many more suspects will flee--and successful flights not only reduce the number of crimes solved but also create their own risks for passengers and bystanders. That is among the reasons why we held in *Soller v. Moore,* 84 F.3d 964 (7th Cir. 1996), that states may set and alter guidelines for the conduct of chases and arrests without fear that they will be held to account under §1983 for departures from their preferred approaches. In a democracy, the people (through the political branches of government) may resolve hard questions as well as easy ones.

DeShaney v. Winnebago County Department of Social

Services, 489 U.S. 189 (1989), offers a different way to see this point--at least when the victims are the passengers in the fleeing car, or pedestrians run over by the criminal, as opposed to persons injured by the police. See also *Archie v. Racine,* 847 F.2d 1211 (7th Cir. 1988) (en banc). A public welfare agency failed to protect Joshua DeShaney from his father. The Court assumed that this failure was culpable under state law, but held that because the injury was inflicted by private hands the due process clause did not provide a remedy. Public officials' decisions played a causal role; no one doubted that had they behaved differently the injury could have been avoided. Still, the Court held, the private role dominated. Joshua's father was a criminal, his crime the immediate source of the injury. The due process clause does not require the state to protect people from criminals. "[A] State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." 489 U.S. at 197. So too here. Burries was a reckless driver, his flight from the police an ongoing crime. Plaintiffs' injuries were the result of criminal behavior by a private actor--behavior that Officer Cherry tried in vain to suppress.

One can say that Burries' crime was a response to Cherry's attempt to make an arrest, and that the high speed of the flight was attributable to Cherry's decision to pursue. These facts do not make what Burries did less a crime, or less essential to the harm. Cherry's actions played a causal role, no doubt, but not the *kind* of cause the law recognizes as culpable. Think again about the hostage taker. The robber yells out: "One step closer and I'll shoot the girl and hold you responsible." The police move in; the robber pulls the trigger and becomes a murderer. Do courts enforce the robber's

view that the police are "responsible" for this death? Not at all; a criminal's effort to shift the blame--the proposition that it is law enforcement that causes crime is not one that any legal system can accept. A different line of cases under the fourteenth amendment shows this by distinguishing between what state actors do because of, and things they do in spite of, particular consequences. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). Governments may be responsible when they act to bring particular consequences about, but no one believes that Cherry *wanted* the passengers of the car dead or injured. (This restates the point that Cherry did not "seize" the car under the approach of *Brower.)* Cherry may have acted in spite of the risk, but that is equally true of the social workers in *DeShaney:* they left Joshua with his father despite knowing the risk that the father would again beat the boy.

DeShaney recognizes that the due process clause requires the state to protect persons in its custody, and the Court held open the possibility that the clause requires the state to offer aid if it cuts off private options, 489 U.S. at 198-203. "The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed in his freedom to act on his own behalf." 489 U.S. at 200. Cherry did not take any of the passengers into custody (had he been able to do so, the risk Burries posed to them would have ended). And he did not restrict their freedom to protect themselves. They could have told Burries to surrender. Perhaps they did, and perhaps he ignored their pleas, but not because the state weakened their position. Joshua similarly could not stop his father's blows.

The Court's point was that the state had not curtailed whatever small ability Joshua had to resist; here, the state did not curtail the passengers' ability to ask the driver to stop, or to overpower him if he continued to endanger their lives.

Death and disability haunt law enforcement. Lax law enforcement emboldens criminals and leads to more crime. Zealous pursuit of suspects jeopardizes bystanders and persons accompanying the offender. Easy solutions rarely work, and *ex post* assessments--based on sympathy for those the criminal has injured, while disregarding the risks to society at large from new restrictions on how the police work--are unlikely to promote aggregate social welfare. Interstices of the Constitution do not contain a solution to the fix the police find themselves in when deciding how vigorously to pursue a criminal. The Constitution's requirements for arrests appear in the fourth amendment. Officer Cherry did not violate the rules that amendment contains. Extra rights come from the political process or the common law rather than constitutional command. Contemporary society may make for itself the hard choices on which public safety depends.

AFFIRMED

RIPPLE, *Circuit Judge,* concurring. I join the judgment of the court. In my view, the district court, relying on the well-reasoned opinions of our colleagues in other circuits, properly applied the "shocks the conscience" test that has developed in the Country's due process jurisprudence.

Eddie Mays, et al. v. City of East St. Louis, et al.
96-3366

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Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

No. 96-3366

September 23, 1997

Before

Hon. FRANK H. EASTERBROOK, Circuit Judge

Hon. KENNETH F. RIPPLE, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

EDDIE MAYS, et al.)	Appeal From The
Plaintiffs-Appellants,)	United States District
)	Court For The
v.)	Southern District Of
)	Illinois
CITY OF EAST ST. LOUIS,)	
LELAND CHERRY, and)	No. 95-CV-530-WDS
VICTOR LEE BURRIES,)	William D. Stiehl,
Defendants-Appellees.)	*Judge.*

Order

Plaintiffs-appellants filed a petition for rehearing and suggestion of rehearing en banc on September 12, 1997. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

EDDIE MAYS, et al.	)
Plaintiffs,	)
	)NO. 95-CV-530-WDS
v.	)
	)
CITY OF EAST ST. LOUIS,	)
ILLINOIS, et al,	)
Defendants,	)
Third Party Plaintiffs,	)
	)
v.	)
	)
VICTOR LEE BURRIES,	)
Third Party Defendant.	)

_____/

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action came before the Court on motions to dismiss.

IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order of August 23, 1996, plaintiffs' claims are DISMISSED, and the third party action against Victor L. Burries is also DISMISSED.

DATED this 23rd day of August, 1996.

STUART J. O'HARE, CLERK

BY: _____
Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

FILED
August 23, 1996
STUART J. O'HARE
CLERK U.S. DISTRICT COURT

EDDIE MAYS, et al.	)	
Plaintiffs,	)	
	)	CAUSE NO.
v.	)	95-CV-530-WDS
	)	
CITY OF EAST ST. LOUIS, ILLINOIS, et al,	)	
Defendants,	)	
	)	
CITY OF EAST ST. LOUIS, ILLINOIS, et al.,	)	
Third Party Plaintiffs,	)	
	)	
v.	)	
	)	
VICTOR LEE BURRIES,	)	
Third Party Defendant.	)	

/

EDDIE MAYS, et al. v. CITY OF EAST ST. LOUIS, et al.
95-CV-530-WDS

MEMORANDUM AND ORDER

STIEHL, District Judge:

Before the Court is defendant City of East St. Louis, Illinois and Leland Cherry's motion to dismiss.

BACKGROUND

On July 10, 1994, at approximately 1:00 a.m., plaintiffs elicited a ride from Victor Lee Burries in exchange for which they would pay him money for his fuel. All of the plaintiffs entered Burries' four-door 1980 Buick Regal bearing Illinois license plates. Burries proceeded down Broadway avenue in East St. Louis. While he was in the vicinity of Second Street and Broadway, defendant Leland Cherry, an East St. Louis police officer, first observed Burries' Buick. Burries drove past Cherry's car which was clearly marked as an East St. Louis police car. After passing the police car, Burries decided to make a U-turn and then proceeded east on Broadway. Upon seeing Burries make the U-turn, Cherry pursued Burries with his spot light, emergency lights, and siren activated. Instead of pulling over, Burries decided to attempt to outrun the police car. Burries proceeded to run through numerous stop signs and red lights as well as swerved in and out of traffic lanes. Cherry continued to pursue Burries until he crossed over some railroad tracks, causing his car to become airborne. Burries lost control of the car and collided head-on into a cement barrier at Twentieth Street and Broadway. As a result of the collision, one of the plaintiffs died and the others suffered various severe injuries.

EDDIE MAYS, et al. v. CITY OF EAST ST. LOUIS, et al.
95-CV-530-WDS

Pursuant to 42 U.S.C. § 1983, plaintiffs have filed suit against the defendants claiming that they violated plaintiffs' Fourteenth Amendment substantive due process rights, Fourth Amendment right against unreasonable search and seizure, and their federal constitutional right of parental association. Plaintiffs also claim that the city of East St. Louis violated their constitutional rights by failing to properly instruct, supervise, control, and discipline defendant Cherry. Finally, plaintiffs have filed state law claims of wilful and wanton misconduct and wrongful death. Presently, defendants have filed a motion to dismiss plaintiffs' complaint.

ANALYSIS

To sustain a dismissal of a complaint or a claim under Fed. R. Civ. P 12(b)(6), the Court must take all well-pleaded allegations as true and construe the complaint in the light most favorable to the plaintiffs to determine whether they are entitled to relief. *Conley v. Gibson*, 355 U.S. 41, 45-56 (1957). "The issue is not whether plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Nevertheless, a plaintiff must allege sufficient facts to outline a cause of action, proof of which is essential to recovery. *Conley*, 355 U.S. at 47.

I. SECTION 1983 CLAIMS

In order to sustain a claim under § **1983**, a plaintiff must prove: (1) that the conduct complained of was committed by a person acting under color of state law; (2) that this conduct deprived the plaintiff of rights secured by the

Constitution or laws of the United States; and (3) that the defendants' acts were the proximate cause of the injuries and consequent damages sustained by plaintiffs. *New Burnham Prairie Homes, Inc. v. Village of Burnham,* 910 F.2d 1474 (7th Cir. 1990). In this case, the sole issue before the Court is to determine whether plaintiffs have adequately alleged that the defendants caused a deprivation of plaintiffs' constitutional rights.

In *Collins v. City of Harker Heights,* 503 U.S. 115 (1992), the Supreme Court re-examined the question of what standard should govern whether certain governmental conduct violates due process. The *Collins* Court reaffirmed its earlier holding in *Rochin v. California,* 342 U.S. 165 (1952), that substantive due process in the context of constitutional torts can be violated only by conduct that is arbitrary or that "shocks the conscience." *Id.* at 126; *see also United States v. Salerno,* 481 U.S. 739, 746 (1987), (holding that "[s]o-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience'"). Nevertheless, there appears to be a split among the circuits as to whether, in the context of high speed police chases, the "shocks the conscience" standard or the lesser "recklessness" standard applies.

For example, in *Fagan v. City of Vinland,* 22 F.3d 1296 (3rd Cir. 1994), the court adopted the "shocks the conscience" standard. The facts in *Fagan* are similar to those in this case. In *Fagan,* at approximately 1:00 a.m., a police officer observed a passenger in a car commit a minor violation. The police officer attempted to stop the vehicle. The vehicle did not stop and a high speed chase through a

residential neighborhood ensued. During the chase, the police officer disregarded traffic signs and signals and violated police department policy. The pursuit ended when the fleeing vehicle ran a red light and broadsided another vehicle, fatally injuring its occupants. The Court found that, as a matter of law, the police officer's conduct did not "shock the conscience."

When analyzing the case, the court noted that there was a split among the circuits as to the appropriate standard necessary for a substantive due process violation. The court, in adopting the "shocks the conscience" standard, cited *Temkin v. Frederick County Corem'rs,* 945 F.2d 716 (4th Cir. 1991). In *Temkin,* the Fourth Circuit found that the "shocks the conscience" standard was not violated where

> (1) the chase continued for a significant period of time over a ten mile area; (2) the chase continued at a very high rate of speed; (3) the chase was initiated because of a minor violation; (4) the police already had, at a minimum, a partial identification of the license plate of the suspect vehicle; and (5) the chase violated General Order # 204 because Shelby [the pursuing officer] failed to maintain radio contact with his supervisor throughout.

Id. at 723. The court, concluding that the defendant's conduct was not sufficient to constitute a § 1983 violation, considered a number of cases in other circuits that found no due process violations in similar circumstances. *Roach v. Fredericktown, Mo.,* 882 F.2d 294 (8th Cir. 1989) (finding that high speed pursuit of a minor traffic offender outside the

officer's jurisdictional limits, without activation of siren in violation of state law, does not rise to level of gross negligence, much less does it "shock the conscience"); *Cannon v. Taylor,* 782 F.2d 947 (11th Cir. 1986) (finding high-speed chase without activating emergency equipment in violation of state law does not violate due process); *Walton v. Salter,* 547 F.2d 824 (5th Cir. 1976) (holding that an isolated case of negligent operation of a police car does not state a claim under § 1983); *Smith v. Lexington Fayette Urban County Gov't,* 884 F. Supp. 1086 (E.D. Ky. 1995) (finding that the "shocks the conscience" standard was not satisfied where police officers initiated a high-speed pursuit of a suspected DUI at close distances, in the city limits where there was vehicular and pedestrian traffic, in disregard of traffic signals, and that the police officers failed to use their emergency equipment, in violation of police department regulations, policy and law).

In this case, plaintiffs acknowledge that the "shocks the conscience" standard is well accepted in many circuits. Nevertheless, plaintiffs' urge this Court to adopt the lesser "reckless" standard. Despite plaintiffs' invitation to adopt the recklessness standard, it is important to point out, as noted in *Fagan,* that the cases that apply the recklessness standard appear to be limited to cases where the victim is already in police custody. The court in *Fagan* found "[t]hat threshold of liability is appropriate in custody cases because the government has restricted an individual's liberty and thereby increased his or her vulnerability to abusive governmental action . . . " *Id.* at 1306. As a result, the appropriate standard in a police pursuit case such as this appears to be the "shocks the conscience" standard.

Plaintiff cites the case of *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) (en banc), cert. denied, 498 U.S. 1065 (1989), for the proposition that the reckless standard should be used by this Court in analyzing their claims. In *Archie*, the Seventh Circuit apparently used the recklessness standard when analyzing the plaintiff's due process claims in the context of a fire department's failure to render rescue services. Plaintiffs' proposition is tempered, however, by the Seventh Circuits rulings in several cases that are more closely analogous to the case at hand. Specifically, in *Bailey v. Andrews*, 811 F.2d 366, 373 (7th Cir. 1987), the court held that "an officer's conduct in making an arrest will not violate due process unless it 'shocks the conscience.'" *Id., citing Rochin*, 342 U.S. at 172. "This circuit has used a three-part test to determine whether an officer's conduct violates the fourteenth amendment." *Id.* "An officer's use of force is unconstitutional if it (1) causes severe injury, (2) is disproportionate to its necessity, and (3) is malicious rather than merely overzealous." *Id., citing Gumz v. Morrissette*, 772 F.2d 1395, 1400 (7th Cir. 1985), cert. denied, 475 U.S. 1123, (1986).

In the instant case, defendant Cherry was engaged in a pursuit through the city of East St. Louis at approximately 1:00 a.m. During the pursuit, he may have disobeyed traffic signs and signals. He did, however, operate his siren and oscillating lights as he pursued the vehicle. It was the driver of the pursued vehicle that made the decision to proceed down a road that dead-ended at a cement barrier. While Cherry was or should have been aware that the vehicle would crash into the cement barrier, his conduct cannot, even in a light most favorable to plaintiff, be considered malicious.

As a result, although plaintiffs allege that defendant Cherry's conduct shocks the conscience, they have failed to set forth sufficient facts to support their allegations. Under *Conley*, 355 U.S. 41, despite the liberal federal standard of notice pleading, simply using words such as "intentionally," "recklessly," or "shocks the conscience" to describe defendant's conduct, without also alleging facts to substantiate that characterization, is not sufficient to sustain a claim for due process violations under § 1983. Courts from the various circuits have repeatedly found that conduct more egregious than that of defendant Cherry does not shock the conscience. Therefore, absent facts that defendant Cherry was using his police vehicle for something other than a legitimate pursuit, plaintiffs' § 1983 claims are not viable.

II. FOURTH AMENDMENT CLAIMS

Plaintiffs also claim that defendant Cherry violated their Fourth Amendment right against unreasonable search and seizure. However, plaintiffs' position is contrary to the law. In *Campbell v. White*, 916 F.2d 421 (7th Cir. 1999), the court held that no seizure occurred where a police officer accidentally ran over the person being pursued. In analyzing the case before it, the court cited the holding in *Roach*, 882 F.2d at 296, that a collision between the car driven by a police officer and another car did not constitute a seizure where the officer did not intend for the pursuit to end by means of an accident. The *Campbell* court further commented that "[t]o presume the existence of a seizure under the circumstances presented in this case ignores the distinction between... an accidental or tortious act which happens to be committed by a government official and an intentional

detention that rises to the level of a constitutional violation." *Id.* at 422-23 *citing Brower v. City of Inyo,* 489 U.S. 593 (1989) (holding that "the word 'seizure'... can hardly be applied to an unknowing act"). Specifically, in *Brower,* the Supreme Court held that

> a fourth amendment seizure does not occur where there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied.*

Brower, 489 U.S. at 596-97.

In this case, as in *Campbell,* while it is clear that Cherry intended to stop Burries, and that his actions may have caused or contributed to a termination of the plaintiffs' freedom of movement, there are no facts that suggest that plaintiff intended Burries to collide with the cement barrier. The collision between Burries' vehicle and the cement barrier was not "the means intentionally applied to effect the stop, but was rather an unfortunate and regrettable accident." *Id.* at 423 (citations omitted). Having concluded that there was no seizure, "a discussion of the reasonableness of (Cherry's) actions would be merely academic." *Id.* As a result, plaintiffs' have failed to allege the minimum facts necessary to state a claim for a violation of their Fourth Amendment right against unreasonable search and seizure.

III. QUALIFIED IMMUNITY

Defendant Cherry also asserts that he is shielded from liability under the doctrine of qualified immunity on plaintiff's constitutional claims. Specifically, government officials who perform discretionary functions, receive qualified immunity from civil damages if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *Anderson v. Creighton,* 483 U.S. 635, 638 (1987). Officials can legitimately take, with independence and without fear of consequences, those actions which do not implicate clearly established rights. *Id.* at 819. Thus, an official is entitled to qualified immunity if, in light of the clearly established principles of law which govern, the official, as a matter of law, could have reasonably believed his actions were lawful. *Id.* at 641. In determining whether qualified immunity exists, the defendant's specifically defined actions are compared to the existing constitutional, statutory, or case law to determine if a violation of the clearly established law occurred. *Landstrom v. Illinois Dep't of Children & Family Servs.*, 892 F.2d 670, 675 (7th Cir. 1990), citing *Rakovich v. Wade,* 850 F.2d 1180, 1209 (7th Cir. 1988) (en banc), *cert. denied,* 488 U.S. 968 (1988). The plaintiff bears the burden of demonstrating that the alleged wrongful conduct violated clearly established law under the specific facts of the case. *Rakovitch,* 850 F.2d at 1209-11. Such a showing requires reference to "closely analogous cases" decided before the alleged wrongful conduct occurred. *Id.* at 1209.

Having previously concluded that the alleged conduct of defendant Cherry did not rise to the level of a constitutional violation of plaintiffs' rights, and since the parties have not cited and the Court has not uncovered any other court's decisions which have held such conduct actionable, any unlawfulness of defendant's conduct could not be apparent to him in light of pre-existing law. Consequently, there can be little doubt that, under *Harlow* and its progeny, defendant Cherry is entitled to qualified immunity for the claims directed against him individually. *Rakovitch,* 850 F.2d at 1209-11.

IV. FAILURE TO INSTRUCT

Plaintiff also claims that the City of East St. Louis is liable for failure to properly instruct, supervise, control, and discipline its officers. In *Roach,* 882 F.2d 294, the court, having dismissed the constitutional claims against the police officers for failure to state a claim, held that because plaintiff did not have a viable claim against the police officers, there could be no municipal liability. The *Roach* court cited *City of Canton v. Harris,* 489 U.S. 378 (1989), as support for its refusal to impose municipal liability. In *Harris,* the Supreme Court held "that the inadequacy of police training may serve as the basis for § 1983 liability . . . where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Id.* at 388 (footnote omitted). Although the court did not discuss in detail the interplay between the underlying constitutional violation and the adequacy of training issue, the Court stated that its task was to determine "if a municipality can ever be held liable under 42 U.S.C. § 1983 for constitutional violations resulting

from its failure to train municipal employees." *Roach,* 882 F.2d at 298, *quoting Harris* at 388.

Thus, "the Court recognized that in order for municipal liability to attach in a situation such as this, there must first be an underlying violation of the plaintiff's constitutional rights by a municipal employee (for whose actions the City is, presumably, to be held accountable)." *Id., citing City of Oklahoma City v. Tuttle,* 471 U.S. 808, 824-25 n.8 (1985). In this case, having found that defendant Cherry committed no underlying constitutional violation, the City of East St. Louis cannot be held liable for inadequate training.

V. WILFUL AND WANTON MISCONDUCT, AND WRONGFUL DEATH

The Court, by virtue of its grant of defendants' motion to dismiss as to Counts I through XXVII of plaintiffs' complaint, declines to exercise its supplemental jurisdiction over plaintiffs' remaining state claims.

CONCLUSION

Accordingly, plaintiffs' federal claims pursuant to 42 U.S.C. § 1983 are DISMISSED with prejudice for failure to state a claim and because defendant Cherry is entitled to qualified immunity. Plaintiffs' claims against the City of East St. Louis for failure to instruct are likewise DISMISSED with prejudice because there was no underlying constitutional violation. The Court declines to exercise its supplemental jurisdiction over plaintiffs' state law claims and, therefore, those claims are DISMISSED, without prejudice, for lack of

subject matter jurisdiction.

In light of the Court's ruling, there being no federal claims remaining against defendants, defendants' third party complaint against third party defendant Victor L Burries is hereby DISMISSED, and this case is dismissed in its entirety.

IT IS SO ORDERED.

DATED: 23 August 1996

/s/ William Stiehl
DISTRICT JUDGE

APPENDIX F

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and

laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(2)

Supreme Court, U.S.
FILED
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No. 97-1388

In The

Supreme Court of the United States

October Term, 1997

EDDIE MAYS, et al.,

Petitioners,

v.

CITY OF EAST ST. LOUIS, ILLINOIS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

The Seventh Circuit correctly determined that the substantive due process approach of the other circuits to have considered the question is outdated. The only issue is whether respondents violated the fourth amendment in pursuing petitioners' car. Under established fourth amendment standards, there was no violation.

Substantive due process does not apply to a claim arising out of the government's failure to protect individuals from the harmful acts of private individuals. The holding in the *DeShaney* case applies to the alleged failure of Officer Cherry to protect the passengers of the Burries' car from his reckless conduct.

Because the Seventh Circuit's analysis of the evidence in this case indicates that it does not believe Officer Cherry acted with deliberate indifference to the rights of the petitioners, granting certiorari would be an act of futility.

ARGUMENT

CERTIORARI SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT HAS EFFECTIVELY HELD THAT SUMMARY JUDGMENT WAS PROPER REGARDLESS OF THE STANDARD OF PROOF EMPLOYED.

The parties argued this case in accordance with the current thinking of many of the circuits on the issue of liability for injuries arising out of police pursuits under 42 U.S.C. § 1983. Respondents argued that the majority of circuit courts to have considered the question hold that

the plaintiff must demonstrate that the officer's pursuit of the fleeing suspect "shocks the conscience." See *Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir. 1994) (en banc). Petitioners argued, consistent with cases such as *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2406 (1997), that they need only prove that the pursuing officer acted with deliberate indifference to the rights of those injured allegedly as the result of the pursuit.

The Seventh Circuit decided the case on three entirely different bases. None of these bases rests on the question of whether Officer Cherry's conduct shocked the conscience or was undertaken with deliberate indifference to petitioners' rights. Accordingly, regardless of this Court's decision in *Lewis*, the affirmance of the summary judgment for respondents will not be changed. Certiorari should therefore be denied.

A. The Seventh Circuit Held That a Complaint Arising out of an Allegedly Improper Police Pursuit Does Not Implicate Petitioners' Constitutional Rights.

The Seventh Circuit reviewed several decisions from this Court in the last decade as part of its fundamental analysis of whether the "substantive due process" component of the fourteenth amendment may give rise to a claim under 42 U.S.C. § 1983 arising out of improper police conduct in apprehending criminal suspects. Its ultimate conclusion, that the fourth amendment is the sole source of constitutional rights in this context, is amply supported by precedent.

Graham v. Connor, 490 U.S. 386 (1989), for example, holds that the fourth amendment proscription against unreasonable searches and seizures is the sole determinant of whether appropriate force was used in effecting an arrest. This Court later construed *Graham* in *U.S. v. Lanier*, ___U.S.___, 117 S. Ct. 1219 (1997), stating "*Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision . . . the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." 117 S. Ct. at 1228, n.7.

More recently, in *Albright v. Oliver*, 510 U.S. 266 (1994), this Court held that there is no constitutional tort of malicious prosecution unless it leads to an unlawful arrest in violation of the fourth amendment.

Based upon these cases, the Seventh Circuit analyzed whether Officer Cherry's pursuit of the fleeing Burries violated the fourth amendment (A4-A5):

> The traffic violation gave Cherry probable cause to arrest Burries. *Whren v. United States*, 116 S. Ct. 1769 (1996). An arrest following a traffic stop includes not only the driver but also the passengers; their freedom, too, will be restricted, if only until the officers assure themselves that the scene is safe. *Maryland v. Wilson*, 117 S. Ct. 882 (1979). But Burries fled, and the arrest was not completed. *California v. Hodari D.*, 499 U.S. 621 (1991). Plaintiffs do not argue that Cherry lured Burries into a barrier or cul de sac in order to cause a collision, so there was no seizure under the approach of *Brower v. Inyo County*, 489 U.S. 593 (1989). *See Kernats v. O'Sullivan*, 35 F.3d 1171 (7th Cir. 1994); *Donovan v. Milwaukee*, 17 F.3d 944

> (7th Cir. 1994); *Campbell v. White*, 916 F.2d 421 (7th Cir. 1990). Similarly plaintiffs do not contend that in giving pursuit Cherry applied deadly force, which may or may not have been justified under the approach of *Tennessee v. Garner*, 471 U.S. 1 (1985). (Burries' acts endangered his passengers and other cars on the road, which may have justified force to bring his car to a stop, but we need not confront the question. Cf. *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988) (en banc).) An automobile on one's tail is some distance from a bullet in the back. The pursued driver has it within his power to avoid injury – indeed, to avoid risk of injury – by slowing to a halt after the officer decides to pursue. *Garner* distinguished a chase from the use of a weapon. So Cherry's actions did not violate the fourth amendment.

The Seventh Circuit's view of the law of "substantive due process" is consistent with this Court's most recent decisions. Its analysis of the uncontested facts concerning the pursuit, as well as the analysis of the district court (see A27-29), demonstrates that Officer Cherry did not violate the fourth amendment in his pursuit of Burries. Thus, there is no conflict with the decisions of other circuits or of this Court.

B. The Seventh Circuit Correctly Applied This Court's Opinion in *DeShaney* to the Facts of This Case.

After assuming for the sake of argument that Officer Cherry's failure to terminate the pursuit out of concern for the occupants of the Burries car was improper, and that the injuries to petitioners in some sense resulted

from that unlawful pursuit, the Seventh Circuit questioned whether the substantive aspects of the fourteenth amendment applied in any event. The court cited this Court's decision in *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989), and determined that no fourteenth amendment violation occurred. That decision is correct, and serves as an independent basis for upholding the judgment of the district court, irrespective of the question of what standard of proof is necessary to establish a fourteenth amendment substantive due process claim.

In *DeShaney*, a child sued a social welfare agency for failing to protect him from his abusive father. The courts assumed that the agency acted inappropriately and that appropriate action would have sheltered the child from injury. Nonetheless, this Court held that "[respondent's] failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." 489 U.S. at 197.

The Seventh Circuit then analogized Officer Cherry's conduct to the conduct of the social welfare agency (A12):

> Burries was a reckless driver, his flight from the police was a crime. Plaintiffs' injuries were the result of criminal behavior by a private actor – behavior that Officer Cherry tried in vain to suppress.
>
> One can say that Burries' crime was a response to Cherry's attempt to make an arrest, and that the high speed of the flight was attributable to Cherry's decision to pursue. These facts do not make what Burries did less a crime, or less essential to the harm.

The question posed by *DeShaney* is whether the harm to the plaintiff is more directly attributable to the acts of a private individual or the government agency which fails to protect the individual from that harm. In the case of a police pursuit, it is not even a close question. Burries held the key to the plaintiffs' safety in his hands at all times. His initial flight instigated the danger, and his refusal to either stop or at least moderate his driving was the true cause of the plaintiffs' ultimate harm. The plaintiffs in this case were at least as much the victims of "private violence" as the plaintiff in *DeShaney*. Accordingly, this Court's fundamental decision concerning the breadth of the fourteenth amendment obviates any need to address the standard of proof for a substantive due process violation.

C. Even if the Seventh Circuit Followed the "Deliberate Indifference" Standard Advocated by Petitioners, Its Opinion Demonstrates That Cherry Was Not Guilty as a Matter of Law.

The Seventh Circuit discusses the propriety *vel non* of Cherry's conduct at length in the opinion. Even if this Court agrees with plaintiffs that liability can be predicated upon deliberate indifference to their rights, the Seventh Circuit's discussion of a police officer's prerogatives when confronted with a fleeing suspect indicates that Cherry would not be found liable as a matter of law. Consequently, because the outcome of the case will not change, there is no reason for this Court to grant certiorari.

The first discussion of the significance of Officer Cherry's conduct arose in the course of comparing the requirements of the fourth amendment with the more amorphous standards for substantive due process (A10):

> The nation's social and legal traditions do not give passengers a legal right – as opposed to a moral claim – to have police officers protect them by letting criminals escape.

At the end of the majority opinion, the court recognizes that police pursuit of fleeing suspects is part and parcel of legitimate law enforcement and, inferentially, not in any sense an act of deliberate indifference to the rights of others (A14):

> Death and disability haunt law enforcement. Lax law enforcement emboldens criminals and leads to more crime. Zealous pursuit of suspects jeopardizes bystanders and persons accompanying the offender. Easy solutions rarely work, and *ex post* assessments – based on sympathy for those the criminal has injured, while disregarding the risks to society at large from new restrictions on how the police work – are unlikely to promote aggregate social welfare.

The Seventh Circuit's discussion of the desirability of police pursuit of fleeing suspects evidences, at worst, a characterization of pursuits as partially good, partially bad. Society may ultimately determine that the costs associated with police pursuits outweigh the benefits, but that scarcely means that a police officer confronted with a driver recklessly endangering a carload of innocent passengers is deliberately indifferent to the passengers' rights when attempting to bring the driver to heel. One

can always ask whether those passengers are better off left to the mercy of a plainly dangerous motorist. What the Seventh Circuit makes plain is that the officer's choice is, as a matter of law, not the type of conduct which could reasonably be characterized as a substantive due process violation. Thus, granting certiorari and reversing the Seventh Circuit is pointless, since the outcome of the case will not change.

CONCLUSION

For these reasons, respondents the City of East St. Louis and Leland Cherry, respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Seventh Circuit.

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